80-397

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. _____

CHARLES LEE, JR.
THOMAS KNIGHT,
DAVE MARTIN,
VERNON CARTER,
LOUIS HOLLINGSWORTH,

Petitioners,

v.

STATE OF INDIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA
PETITION FOR A WRIT OF CERTIORARI

JOHN D. CLOUSE
1004 Hulman Building
Evansville, IN 47708
Telephone: (812) 424-6671
Counsel for Petitioners

Unigraphic, Inc., 1401 N. Fares Ave., Evansville, Ind. 47711, Phone 424-3680

THE QUESTIONS PRESENTED FOR REVIEW

Can the gambling laws of a state be enforced in a deliberately discriminatory manner based upon an unjustifiable standard?

THE PARTIES TO THE PROCEEDING

These are all shown in the caption of the case.

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REFERENCE TO THE OPINION BELOW

The opinion of the Court of Appeals of Indiana, reported at 397 N. E. 2d 1047, appears in Appendix A hereto.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Court of Appeals of Indiana was entered on December 18, 1979. (In that court no separate judgment is entered, the opinion contains it.)

A timely petition for rehearing was denied on January 22, 1980. (Appendix B)

A timely petition to transfer the cause to the Supreme Court of Indiana was denied on July 22, 1980. (Appendix C) The Supreme Court of Indiana is the highest court in that state having jurisdiction to review decisions of lower state courts. (Indiana Rules of Appellate Procedure, Rule AP 11[B].)

This petition for a writ of certiorari will be filed within sixty (60) days of the Indiana Supreme Court's refusal to review or "transfer" the decision herein. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitution of the United States:

14th Amendment:

> "* * * No state shall make or enforce any law which shall abridge the privileges or immunities of the United States; nor shall any state

deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Indiana Code:

"35-45-5-3. Professional gambling. - A person who knowingly or intentionally:

(1) Engages in pool-selling;

(2) Engages in bookmaking;

(3) Maintains, in a place accessible to the public, slot machines, one-ball machines or variants thereof, pinball machines that award anything other than an immediate and unrecorded right of replay, roulette wheels, dice tables, or money or merchandise pushcards, punchboards, jars, or spindles;

(4) Conducts lotteries, gift enterprises, or policy or numbers games, or sells chances therein;

(5) Conducts any banking or percentage games played with cards, dice or counters, or accepts any fixed share of the stakes therein; or

(6) Accepts, or offers to accept, for profit, money or other property risked in gambling; commits professional gambling, a class D felony. [IC 35-45-5-3, as added by Acts 1976, P.L. 148, §5, p. 718; 1977, P.L. 340, §82, p. 1533.]"

STATEMENT OF THE CASE

The action was instituted by the filing of a multiple count indictment against the petitioners and another (one Mike Runau) on the 26th day of July, 1978. (R. 14. Note: references to the Record of the Proceedings on file in the Court of Appeals of Indiana will be shown thus "R. ") Included in this indictment were counts charging conspiracy to commit professional gambling. (R. 24-26)

On August 10, 1978 petitioners filed a motion to dismiss, raising the federal question here involved. The motion averred, *inter alia*:

"* * *

"1. The information is defective pursuant to I.C. 35-3.1-1-6 in that the statute defining the crime charged is unconstitutional or otherwise invalid.

"* * *

"MEMORANDUM

The statute defining the crime, I.C. 35-45-5-3, both upon its face and its application herein, violates the following constitutional provisions:

* * *

The Constitution of the United States, the Fourteenth Amendment, all clauses thereof.

"* * *

"3. That said statute under which these Defendants are charged, and its statutory predecessor, the prior act defining such offense, have been applied with an "unequal

hand" (see *Yick Wo v. Hopkins*, 1886, 118 U.S. 556). Defendants aver that such acts have never been applied to religious organizations nor veterans' organizations, who openly violate the terms of the present act and its predecessor act. * * *" (R. 52-57)

Petitioners introduced evidence in support of this motion. It established that Catholic Churches, veterans' organizations and private clubs of Evansville, Indiana, have for a number of years openly violated the gambling laws of the State of Indiana with complete impunity. The local police and prosecutor have known about this for a number of years, have done nothing about it and do not intend to.

More specifically, the parties stipulated that bingo was a game of chance. (R. 341) Nine Catholic priests testified that their churches had conducted regular bingo games for a number of years. (R. 340, 343, 345, 347, 351, 353, 355, 357, 358) Some had conducted other gambling enterprises. (R. 351, 359) The gambling was conducted openly, (R. 342, 344, 346, 348, 352, 354, 355, 357) and at least one bingo was advertised. (R. 342) No one had ever been prosecuted or threatened with prosecution because of this. (R. 341, 343, 346, 348, 352, 354, 355, 357)

Private clubs of Evansville also violate the gambling laws of the state with impunity: The Evansville Country Club sponsors gambling, including dice games and blackjack. (R. 335-6, 338) The Evansville Athletic Club has bingo games. (R. 360) Germania Mannerchor has bingo. (R. 363) The Eagles' Country Club has raffles and slot machines. (R. 365, 366-8) The Haymakers have poker games and ticket jars. (R. 370) The Shrine has a lottery. (R. 381) All of these games are conducted openly. (R. 360, 363, 372, 382) No one is ever prosecuted for this. (R. 338, 360, 363, 368, 372, 382)

Veterans' organizations are also immune: The V.F.W. has an open bingo, (R. 373-4) and the American Legion had slot machines and was not prosecuted. (R. 390-391)

The present prosecutor and three of his predecessors

testified that they knew about this gambling, (R. 333, 350, 376, 392) did not prosecute, (R. 332, 350, 376, 394) and will not. (R. 394)

Alan Shuttle is the present head of the vice squad of the Evansville Police Department. He has been on the police force twenty-six years, on the vice squad for twenty-one and one-half years and been in charge of it for ten years. (R. 383) He has known about church, veterans' and private club gambling for twenty-six years. (R. 384) He added that the Roman Catholic Diocese of Evansville sponsors a continuing lottery. (R. 384) None of these offenders has ever been prosecuted. (R. 386-8) Since some of officer Shuttle's testimony is so telling, it is included as Appendix D.

The motion to dismiss was overruled. (R. 61)

Trial to a jury was thereafter had. The facts adduced at the trial are summarized in the opinion of the Indiana Court of Appeals. (Appendix A, *infra*) The jury found petitioners guilty of two counts (V and VI) of conspiracy to commit the felony of professional gambling. (R. 67, 78, 79) Thereafter, the court imposed judgment and sentence upon petitioners: Lee, Knight, Carter and Hollingsworth were sentenced to two, and Martin one, years imprisonment. (R. 105-106A)

The petitioners filed a motion to correct errors, the Indiana prerequisite to an appeal, which again assigned as error the federal question here urged:

"1. Uncorrected errors of law occurring and properly raised in the proceedings prior to the trial in this, to-wit:

(a) The Court erred in overruling and denying the defendant's motion to dismiss.

Said motion should have been sustained for the reasons stated therein, which reasons are here adopted by reference, and for the reason that the evidence introduced in support of said motion showed that the charges filed against the defendant were the result of unconstitutionally selective enforcement of the gambling laws of Indiana in violation of the Fourteenth Amendment to the Constitution of the

United States." (R. 1-2)

This motion was summarily overruled. (R. 117A)

Petitioners appealed to the Indiana Court of Appeals, arguing the same federal question in their respective briefs. (Appellant Hollingsworth's brief, pp. 17-34; the brief of the other petitioners incorporated Hollingsworth's argument by reference, their appellants' brief, pp. 16-17) The Indiana Court of Appeals affirmed the petitioners' conviction after ordering a correction of their sentence.

Petitioners filed petitions for rehearing which were denied. (Appendix B) They petitioned the Indiana Supreme Court to review or "transfer" the cause and those petitions were denied. (Appendix C)

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

A state court of last resort has decided a federal question in a way in conflict with a decision of this Court.

Yick Wo v. Hopkins, 118 U.S. 356 (1886) is the seminal case in the area of unconstitutional application of a law and petitioners rely heavily upon it. However, petitioners believe that a Circuit Court case, *United States v. Alarik*, 439 F.2d 1349 (8th Cir. 1971), correctly summarizes the current state of the law as pronounced by this Court:

> " * * * a prosecutor may exercise discretion in deciding who should be prosecuted as long as he does not deliberately discriminate between persons in similar circumstances based upon an unjustifiable standard such as race, religion, or other arbitrary classification. Oyler v. Boyles, Warden, 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed. 2d 446 (1961); Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); * * *" (Footnote omitted)

Thus, two questions are posed for petitioners' answer; the first: Was there deliberate discrimination? There is absolutely no doubt that there was. The record fully supports an affirmative answer to the first question. (See statement of the case and Appendix D) Petitioners will not belabor that point further, and turn to the second question: Was the discrimination based upon an unjustifiable standard?

Absent a clear precedent from this Court that question is likely to be argued on a "yes it was", "no it wasn't" basis. However, the answer is supplied by an unlikely source - - the Supreme Court of Indiana in the case of *Fairchild v. Schanke*, 232 Ind. 480, 113 N.E.2d 159 (1953).

Fairchild is an interesting case and bears reading in connection with petitioners' claims of discriminatory enforcement. In that case, Schanke, an individual, brought an injunction action against Frank Fairchild, then prosecutor of Marion County, Indiana. Schanke alleged that the existing gambling statutes violated the equal privileges and immunities provision of Article 1, §23 of the Indiana Constitution in that they expressly excluded "bona fide religious, patriotic, charitable, or fraternal clubs." Upon the granting of a temporary injunction, Fairchild appealed.

The Indiana Supreme Court upheld the lower court decision, holding that the distinction made by the legislature between "bona fide religious, patriotic, charitable, or fraternal clubs" and all others "does not rest upon a reasonable basis and is arbitrary and unreasonable." *Id.* at 493, 113 N.E.2d 159

In its decision, the Court made the following observations, apropos to evidence introduced at the hearing on petitioners' motion:

> "Is there any substantial distinction between a bona fide religious, patriotic, charitable or fraternal club seeking and receiving profit from the conduct of a lottery, the operation of slot machines, or any other gambling device, and an

individual, a social club, or professional gambler who operates a similar lottery enterprise, slot machines or other gambling devices?

We can see none. Nor has any valid distinction been pointed out to us by appellants.

Appellants attempt to justify the exclusion on the ground that the consequences to society are not the same if the profit from activities which constitute gambling goes to buy new athletic equipment for a Sunday School, as if such profits went to organized gambling. They further suggest that the threat or danger to society is different from that posed by professional gambling. This argument was ably answered by the Supreme Court of New Mexico in *Harriman Institute, etc. v. Carrie Tingley C.C. Hospital* (1938), 43 N.M. 1, 84 P.2d 1088, when, at page 1091, it said:

> '. . . the gambling spirit feeds itself with as much relish upon a charity lottery as upon any other kind. If the average person be consumed with a desire to take a chance and get something for nothing, it matters not to him whether the promoter makes a profit or that the profit goes to charity. Indeed, if it does to do charity, his participation wears a cloak of piety otherwise denied it. He thus may be persuaded to purchase tickets oftener and in larger volume because operated in the name of charity or religion.

> The point we seek to make is that widespread participation in a charity lottery is just as baneful in its effect upon the public as widespread participation in any other kind of lottery.'

The reasoning employed in the above case applies with equal force in the case at bar.

* * *

"Does the classification here rest upon a reasonable basis?

* * *

The classification attempted in §2 (8) of the act clearly does not rest upon a reasonable basis and is arbitrary and unreasonable. The act does not affect all persons similarly situated. It is class legislation in the highest degree and contravenes §23 of Art. 1 of the Constitution of Indiana." *Id.* at 489-493, 113 N.E.2d 159.

Consequences of a Favorable Decision

Petitioners are compelled to address the issue of what a ruling in their favor would mean. Reversing petitioners' conviction would give the Indiana local prosecutor two options - - he could enforce the gambling laws uniformly against individuals and organizations alike, or he could not enforce the laws against anyone. Reversing petitioners' convictions must result in a change of policy, as similar grounds for dismissal will undoubtedly be raised in subsequent gambling prosecutions.

No one would like to see the second approach taken -- to do so would be a dereliction of duty in the highest degree. But is the first option equally unfeasible? Would even-handed and neutral enforcement bring mobs of little old ladies to the streets in a recurrence of the "bingo riot" of the 1940's?

It is submitted that such a disastrous scenerio need not occur. Full scale raids on religious and social clubs need not take place in order to eliminate organization sponsored gambling. As Appendix D demonstrates, members of the Evansville police and the local prosecutor's offices keep in close communication with such groups, occasionally sending them word to "clean up their act." A similar announcement that such activities will heretofore be viewed as violations of the law, subject to prosecution, would result in the vast majority of these games being discontinued. Few priests or club presidents will be willing to risk prosecution and the publicity it would bring.

If people, then, became unaccustomed to gambling at these establishments, perhaps it would be possible to obtain convictions for those who insist on violating the law. At least the gambling laws would be enforced as written and as intended by the Federal Constitution.

There is no doubt that a ruling in favor of petitioners would cause difficulties for the law enforcement officials in Vanderburgh County. However, as stated by this Court in *Williams v. Illinois*:

> "We are not unaware that today's holding may place a further burden on States in administering criminal justice. Perhaps a fairer and more accurate statement would be that new cases expose old infirmaties which apathy or absence of challenge has permitted to stand. But the constitutional imperitives of the Equal Protection Clause must have priority over the comfortable convenience of the status quo." 399 U.S. 235 at 245 (1970)

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals of Indiana.

Respectfully submitted,

JOHN D. CLOUSE
1004 Hulman Building
Evansville, IN 47708
Telephone: (812) 424-6671
Counsel for Petitioners

APPENDIX A

OPINION AND JUDGMENT OF THE INDIANA COURT OF APPEALS

FOR
PUBLICATION

Attorneys for Appellants:

JACK N. VanSTONE
THOMAS G. KROCHTA
103 N.W. Tenth
Evansville, Indiana 47708
(Attorneys for Charles Lee, Jr., Thomas Knight, Dave Martin, Vernon Carter, Mike Runau)

JOHN D. CLOUSE
MICHAEL C. KEATING
1004 Hulman Building
Evansville, Indiana 47708
(Attorneys for Louis Hollingsworth)

Attorneys for Appellee:

THEODORE L. SENDAK
Attorney General of Indiana

RICHARD ALBERT ALFORD
Deputy Attorney General

Office of the Attorney General
219 State House
Indianapolis, Indiana 46204

IN THE

COURT OF APPEALS OF INDIANA

FIRST DISTRICT

CHARLES LEE, JR., THOMAS KNIGHT, DAVE MARTIN, VERNON CARTER, LOUIS HOLLINGSWORTH, MIKE RUNAU,	)	FILED Marjorie H. O'Laughlin DEC 18 1979 Clerk of the Indiana Supreme and Court of Appeals
Defendants-Appellants,	)	
-v-	)	NO. 1-579 A 133
STATE OF INDIANA,	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VANDERBURGH CIRCUIT COURT
The Honorable William H. Miller, Judge

Neal, J.

Defendants-appellants Dave Martin (Martin), Thomas Knight (Knight), Vernon Carter (Carter), Charles Lee, Jr. (Lee), Louis Hollingsworth (Hollingsworth), and Mike Runau (Runau) were convicted of conspiracy to commit professional gambling.

They raise the following issues for our review:

(1) Whether the trial court erred in overruling the defendants' motion to dismiss.

(2) Whether the trial court erred in denying the defendants' motion for separate trials.

(3) Whether the trial court erred in admitting evidence relating to the charges without limitation as to the time of the occurrences.

(4) Whether there was sufficient evidence introduced at trial to sustain the verdict of the jury.

(5) Whether the trial court erred in denying defendants' motion to correct judgment.

We affirm.

The evidence most favorable to the State discloses that Knight operated a tavern in Evansville by the name of "Knight's Nite Spot." In a room in the rear of the same building gambling operations were conducted. The room was equipped with a modified pool table upon which dice was played. A blackjack table, with high stools around it upon which the customers could and did sit, was provided. Food, beer, and coffee were served without charge to customers and persons in attendance. Admittance was gained to the room by pressing a buzzer, whereupon a door attendant would then scrutinize the person seeking admittance through a peephole before allowing him to proceed. One doorkeeper, employed by Knight, testified that it was his duty to attend the door, to keep out undesirables, and to watch for the police. Blackjack and dice were played for money, some customers winning or losing as much as $500 in a single evening. Customers played the house, not each

other. Payroll checks were cashed. Chips, in varying denominations from one dollar to twenty-five dollars, were sold to customers by attendants, and thereafter cashed, if any remained, at the close of play.

All of the defendants participated in one way or the other in the management and operations of the enterprise. Their duties varied, depending upon who was available, or working, and according to the exigency of the situation. They sold and cashed chips, were stickmen, attended the door, dealt cards, or acted in a supervisory capacity.

The room was maintained for gaming purposes for as much as two years continuously in Knight's Nite Spot, terminating there sometime in 1977. Thereafter, it was reestablished in what was described as the antique shop at 1021 Kentucky Avenue, just down the alley from Knight's Nite Spot. The new location, owned by Hollingsworth, was an old residential building. There, the gaming operation was renewed in the same manner as before, with all defendants participating as before. Operations, so far as the record discloses, terminated on January 13 or 14, 1978, when police officers began surveillance of the house.

Upon discovery of the police activity, the doorman alerted Knight, whereupon the games were stopped, and the equipment hidden. Some of the customers and some defendants stayed in the house the remainder of the night and into the next day, apparently to avoid detection. Police surveillance detected nine cars parked outside, and further detected numerous people entering and leaving the suspected premises.

I.

Defendants argue that the trial court erred in overruling their motion to dismiss which stated that their prosecution was a result of selective and discriminatory enforcement of the gambling laws of Indiana. The gist of the defen-

dants' argument is that while gambling laws were enforced against them, religious, social, and veterans organizations were allowed to conduct gambling operations without prosecution. Citing *Yick Wo v. Hopkins*, (1886) 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220, they argue that they were denied equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States and Articel 1, § 23 of the Constitution of Indiana. *Yick Wo* is distinguishable from the case at bar in that it dealt with discriminatory enforcement of a city ordinance against a readily identifiable class, but the defendants before us are not part of a particular group which was singled out for prosecution.

In *Highland Sales Corp. v. Vance*, (1962) 244 Ind. 20, 186 N.E.2d 682, our Supreme Court dealt with an action by a department store and its employees who sought to enjoin the enforcement of a law which prohibited the operation of the store on Sunday. The appellants claimed that they were denied equal protection since other businesses such as drug stores, gasoline stations, and restaurants were allowed to operate on Sundays. The court stated that the failure to prosecute some who violate the law does not excuse violations by others, nor should it bar their prosecution. Also, there was no personal animosity which supported the discrimination argument.

Noting the judiciary's role in relation to a prosecuting attorney's discretionary power, the court said, at 889:

> "We do not minimize the duty of the prosecuting attorney to exercise the power of his office fairly and in good faith. However, in order to warrant judicial interference with the office of the prosecuting attorney because of either nonfeasance or malfeasance, it must be made to appear from the facts alleged that such misconduct consists of a gross and intentional failure or refusal to enforce the law in some

> *major area* or that such misconduct is actually the product of bad faith or evil design." (Emphasis added.)

In light of the heavy case load facing a prosecuting attorney, it is clear that the failure to prosecute charitable organizations in no way establishes that the defendants were denied equal protection. The State showed that there was a reasonable basis for the way the gambling laws were enforced

II.

Hollingsworth and Runau allege that the trial court erred in denying their motions for separate trials pursuant to IND. CODE 35-3.1-1-11 (Supp. 1979) which were filed on the morning of the trial. The statute reads as follows:

> "(a) Whenever two (2) or more offenses have been joined for trial in the same indictment or information solely on the ground that they are of the same or similar character, the defendant shall have a right to a severance of the offenses. In all other cases the court, upon motion of the defendant or the prosecutor, shall grant a severance of offenses whenever the court determines that severance is appropriate to promote a fair determination of the defendant's guilt or innocence of each offense with a view to the number of offenses charged, the complexity of the evidence to be offered, and whether the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.
>
> (b) Whenever two (2) or more defendants have been joined for trial in the same indictment

or information and one (1) or more defendants move for a separate trial because another defendant has made an out-of-court statement which makes reference to the moving defendant but is not admissible as evidence against him, the court shall require the prosecutor to elect either:

(1) a joint trial at which the statement is not admitted into evidence;

(2) a joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been effectively deleted; or

(3) granting the moving defendant a separate trial.

In all other cases, upon motion of the defendant or the prosecutor, the court shall order a separate trial of defendants whenever the court determines that a separate trial is necessary to protect a defendant's right to a speedy trial or is appropriate to promote a fair determination of the guilt or innocence of a defendant.

(c) When such information would assist the court in ruling on a motion for a separate trial, the court may order the prosecutor to disclose to the court in camera any statements made by the defendants which the prosecutor intends to introduce in evidence at the trial." (Emphasis added.)

Defendants argue that part (a) gives them the right for separate trials. However, part (a) deals with severance of offenses, not separate trials. Defendants did not ask for

severance of offenses. The statutory language emphasized above is the relevant language here, and it states that the granting of separate trials is at the discretion of the trial court. In a denial of a motion for separate trials, there is reversible error only when there is a clear showing that the trial court abused its discretion. *McFarland v. State*, (1977) Ind. App., 359 N.E.2d 267.

When a pretrial motion for separate trials is overruled any error is deemed waived by failure to renew the motion before or at the close of all the evidence. IND. CODE 35-3.1-1-12(b). We find no indication that Hollingsworth and Runau renewed the motion, and thus, they waived their right to separate trials.

III.

Defendants argue next that the trial court erred by admitting testimony that went beyond the time frame of the statute of limitations. Defense counsel objected to testimony by L. P. Dallas and Sidney Gynn concerning the times when they participated in gambling activities. In both instances, the record shows that immediately after the objection was overruled, the prosecution pinpointed the time in question which was within the statute of limitations.

IV.

The sufficiency of the evidence is also challenged by the defendants. When we review the sufficiency of the evidence, we consider only that evidence of probative value most favorable to the State, together with reasonable inferences which may be drawn therefrom. We will not disturb a verdict if the evidence and inferences would permit the trier of fact fo find the existence of the elements of the crime beyond a reasonable doubt. *Diggs v. State*, (1977) Ind.,

364 N.E.2d 1176.

In *Duling v. State*, (1976) Ind. App., 354 N.E.2d 286, Judge Lowdermilk noted the factors which constitute a conspiracy, at 289:

> "In order to be a conspiracy there must be an intelligent and deliberate agreement to commit the offense charged. It is sufficient if the minds of the parties meet understandingly to bring about an intelligent and deliberate agreement to do the acts and commit the offense, though the agreement is not manifest by any formal words. Concurrence of sentiment and co-operative conduct in the unlawful and criminal enterprise are the essential ingredients of criminal conspiracy. There must be an agreement and there must be evidence to prove the agreement directly, ro such a state of facts that an agreement may be legally inferred. Conspiracies cannot be established by a mere suspicion. Evidence of mere relationship of association between the parties does not show a conspiracy." (Citation omitted.)

He also said that an agreement need not be directly proven, but it may be inferred from other facts.

The conspiracy statute, IND. CODE 35-41-5-2, reads, in pertinent part:

> "(a) A person conspires to commit a felony when, with intent to commit the felony, he agrees with another person to commit the felony....
>
> (b) The state must allege and prove that either the person or the persons with whom he agreed perfòrmed an overt act in furtherance of

the agreement."

IND. CODE 35-45-5-3 (Supp. 1978), the Indiana professional gambling statute reads as follows:

> "A person who knowingly or intentionally:
>
> (1) engages in pool-selling;
> (2) engages in bookmaking;
> (3) maintains, in a place accessible to the e public, slot machines, one-ball machines or variants thereof, pinball machines that award anything other than an immediate and unrecorded right of replay, roulette wheels, dice tables, or money or merchandise pushcards, punchboards, jars, or spindles;
> (4) conducts lotteries, gift enterprises, or policy or numbers games, or sells chances therein;
> (5) conducts any banking or percentage games played with cards, dice, or counters, or accepts any fixed share of the stakes therein; or
> (6) accepts, or offers to accept, for profit, money or other property risked in gambling;
>
> commits professional gambling, a class D felony."

Testimony of the State's witnesses at trial showed that the defendants worked together in conducting the gambling operation by selling and cashing chips, working as stickmen in the dice game, or dealing blackjack. From this testimony the jury could reasonably infer that the intent, agreement, and overt act required by IND. CODE 35-41-5-2 took place and were supported by sufficient evidence.

V.

Defendants also contend that the trial court erred by denying the defendants' motion to correct judgment in which they argued that the jury's verdict was inconsistent. Defendants were found guilty of the conspiracy charges, but the jury failed to return a verdict regarding the substantive offenses which were charged.

In providing a conspiracy, it is not necessary to prove that the object of the conspiracy has been carried out. *Bates v. State*, (1977) Ind., 366 N.E.2d 659. Once the conspiracy has been established, we need not address the substantive offense. In *Bates, supra,* there was evidence tending to show murder and evidence tending to show conspiracy to commit murder. The defendant was convicted upon the conspiracy county. The court held that under the standard of review such a verdict is not objectionable.

One matter remains though not raised in the briefs, that of the sentencing. Three defendants, Knight, Hollingsworth, and Carter, were each convicted on Count V and Count VI of the indictment. The imposed sentence was one general sentence to each defendant, and the trial court did not designate whether the sentence was imposed on Count V or Count VI. The trial court is directed to correct the sentence and sentence and/or dispose of each count separately. For the reasons stated above the decision of the trial court must be affirmed upon correction of the sentencing as directed.

Affirmed and remanded for correction of sentence.

LOWDERMILK, P. J. and ROBERTSON, J. CONCUR.

APPENDIX B

ORDER OF THE INDIANA COURT OF APPEALS DENYING REHEARING

IN THE

COURT OF APPEALS OF INDIANA

FIRST DISTRICT

CHARLES LEE, JR., et. al.	)	
Defendants-Appellants	)	
	)	
vs.	)	**NO. 1-579 A 133**
	)	
STATE OF INDIANA	)	
Appellee-Plaintiff	)	

Appellant Louis Hollingsworth Petition for Rehearing Denied.

Buchanan, C. J.

Appellants Charles Lee, Jr., Thomas Knight, David Martin, Vernon Carter and Mike Runau Petition for Rehearing Denied.

Buchanan, C. J. (sic)
January 22, 1980

APPENDIX C

ORDER OF THE INDIANA SUPREME COURT DENYING TRANSFER

IN THE

SUPREME COURT OF INDIANA

CHARLES LEE, JR., et. al.	)	
Defendants-Appellants	)	
	)	
vs.	)	NO. 1-579 A 133
	)	
STATE OF INDIANA	)	
Appellee-Plaintiff	)	

Appellant, Louis Hollingsworth's, Petition to Transfer is Denied.

Given, C. J. All Justices Concur.

Appellant, Lee, Knight, Martin, Carter and Runau, Petition to Transfer is Denied.

Given, C. J. All Justices Concur. (sic)
July 22, 1980

APPENDIX D

Excerpt from testimony of Alan Shuttle, vice squad chief of the Evansville, Indiana Police Department on the hearing on petitioner's motion to dismiss.

"Q. Can you tell why you have not, that is ask (sic) for the prosecution of any religious, veterans or private organization engaged in gambling?

A. Well, with every chief and probably every Prosecutor we've had all the years I've been here, I've discussed it with them. And after a discussion, we always felt like if we didn't get too many complaints on them or anything, we just didn't get too worried about them; and I've had very few complaints over the years on clubs, churches.

Q. And in other words then as I understand your testimony, during your twenty-one years as tenure on - - during your twenty-one years on the vice squad you have met with the respective chiefs of police and the prosecuting attorneys through the years, and you've all agreed that you would not prosecute religious organizations, veterans' organizations, and private clubs for any gambling activities?

A. Well, no, not exactly that way unless we got repeated complaints, then we probably would have took some action, which we never did get repeated complaints. We got a complaint on somebody why we talked to them about it, and usually that's the last we ever heard of it, but if it would have kept coming back to us why I believe somebody probably would have got prosecuted.

Q. Okay, then if I understand your position is that again, you during your tenure on the vice squad, that you and the chief of police and the respective Prosecutors would agree that you would not prosecute any religious, veterans, or private organizations for gambling unless you got too many complaints would that be correct?

A. That's about right.

Q. And when you got too many complaints, you would go and give them a talking to?

A. Well, they usually got talked to on the first complaint.

Q. And what kind of talks were they?

A. Well, we have an understanding with the Council of Clubs that we have a committee of three members from the Council of Clubs, that way I can always reach somebody if we do get a complaint. And that's usually my first step if I get a complaint on a club, I will contact one of those members and explain to them what we have and tell them I don't want to hear anymore about it, if I do, then I will be out; and I never had to go back out.

Q. Okay, now what is the Council of Clubs, Sergeant Shuttle?

A. It's a sort of a governing body I suppose with all the clubs in it or most of the clubs, I won't say all of them, most of the clubs probably in Vanderburgh County. I don't really know.

Q. That is that would not be -- they would have no jurisdiction over a religious club for instance?

A. I don't really know. I don't think so.

Q. Or a veterans' club?

A. Yes, I believe they do over a veterans' club.

Q. And then what kind of complaints are you talking about, does someone complain that they were gambling?

A. Somebody called in and complained that their husband was gambling at a club or somebody had lost some money there or somebody didn't get paid for winning or something like that why they would complain to me, and then I would contact --.

Q. Well, what would you tell the club then to do or not do after you went to them?

A. I would just tell them to satisfy the complaint or stop it or whatever it took. I just told them I didn't want to hear anymore about it, if I got anymore complaints, I would be out.

Q. And you did this a number of times?

A. Oh, yes.

Q. In other words if some wife felt her husband was blowing all his money at the VFW or someone felt the game was crooked you'd go and tell them, that particular club, that you didn't want to hear anymore about it?

A. That's right.

Q. After any of these talks, did you ever ask that any of these clubs be prosecuted?

A. No, I don't believe so.

Q. So, in all your twenty-one years none of these particular types of clubs which you talked about veterans, private, religious, have been prosecuted for gambling law violations?

A. Not to my knowledge. I don't believe there has." (Direct examination on hearing on motion to dismiss, R. 385-388)

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IN THE

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THOMAS KNIGHT,
DAVE MARTIN,
VERNON CARTER,
LOUIS HOLLINGSWORTH,

Petitioners,

v.

STATE OF INDIANA,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS

THEODORE L. SENDAK
Attorney General of Indiana
FRANK A. BALDWIN
Deputy Attorney General
Offices of the Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 232-6236
Attorneys for Respondent

C. E. Pauley & Co., Inc., Indianapolis

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS

Respondent, the State of Indiana, respectfully prays this Court to deny the issuance of a writ of certiorari directed to the Court of Appeals of Indiana, thereby refusing to review the opinion entered by the Indiana Court of Appeals in Cause No. 1-579 A 133 on December 18, 1979.

OPINION BELOW

The Indiana Court of Appeals for the First District entered a decision in this cause on December 18, 1979. This opinion may be found in Petitioners' Appendix A and is unofficially reported at 397 N.E.2d 1047. Rehearing was denied by the Indiana Court of Appeals on January 22,

1980 and transfer was denied by the Indiana Supreme Court on July 22, 1980.

STATEMENT OF THE CASE

Petitioners were charged by way of a multiple count indictment filed on July 26, 1978. The indictment included counts charging the Petitioners with conspiracy to commit professional gambling. Petitioners filed a motion to dismiss on August 16, 1978. This motion was overruled.

Jury trial was commenced on November 13, 1978. On November 15, 1978, the jury found petitioners guilty of two counts of conspiracy to commit professional gambling. On December 15, 1978, the court entered judgment on the merits and sentenced Petitioners Lee, Knight, Carter and Hollingsworth to serve two year terms of imprisonment. Petitioner Martin was sentenced to serve a term of one year.

Petitioners filed their motion to correct errors on February 9, 1979, and February 13, 1979 respectively. Subsequently, these motions were overruled.

Petitioners appealed their convictions and on December 18, 1979, the Indiana Court of Appeals for the First District affirmed the convictions, remanding for correction of sentence. Petitioners filed petitions for rehearing which were denied on January 22, 1980. On July 22, 1980, the Indiana Supreme Court denied Petitioners' petitions to transfer.

STATEMENT OF THE FACTS

Petitioner Thomas Knight operated a tavern in Evansville, Indiana known as "Knight's Nite Spot". Gambling activities were conducted in a room in the rear of the tavern. Customers seeking entrance to the room were screened by a door attendant, whose duty it was to refuse entrance to undesirables and watch for police. Once in the

room, customers were provided with food, beer, and coffee without charge. Customers played blackjack and dice against the house, and some customers won or lost up to $500 in one evening. The evidence showed that each of the petitioners participated in the management and/or operation of Knight's Nite Spot. Sometime in 1977 the gambling operation of Knight's Nite Spot ceased. However, the operation was reestablished in a new location and continued until police surveillance was detected by the operators in January of 1978.

In support of their motion to dismiss, Petitioners introduced evidence that various religious, social and veterans organizations were permitted to conduct gambling activities in Evansville without prosecution.

REASONS FOR DISALLOWANCE OF THE WRIT

Petitioners assert that their convictions for conspiracy to commit professional gambling constitute a denial of equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States. In support of their argument, Petitioners rely heavily on this Court's decision in *Yick Wo v. Hopkins,* 118 U.S. 356 (1886). However, the Indiana Court of Appeals justifiably distinguished the facts of *Yick Wo* from those of the case at bar. In *Yick Wo* this Court was presented with the discriminatory enforcement of a San Francisco ordinance purporting to regulate the operation of public laundry businesses in wooden buildings. The ordinance vested discretion in a board of supervisors to grant consent to those wishing to operate a public laundry in a wooden building. Criminal penalties were provided for those operating a laundry without such consent. The facts showed that consent was generally given to non-Chinese applicants, while applications from Chinese subjects were refused without exception. This Court held that such discriminatory design

violated the Fourteenth Amendment to the United States Constitution.

Petitioners, unlike the Chinese subjects in *Yick Wo,* are not members of a readily identifiable class singled out for prosecution. Prosecutorial selection is constitutionally prohibited if deliberately based upon an unjustifiable standard such as race, religion, or some other arbitrary classification. *Oyler v. Boles,* 368 U.S. 448, (1962). Respondent feels that the Court of Appeals for the Second Circuit correctly summarized the law of discriminatory prosecution in *United States v. Berrios,* 501 F.2d 1207, 1211 (2nd Cir. 1974) as follows:

> To support a defense of selective or discriminatory prosecution, a defendant bears the heavy burden of establishing, at least *prima facie,* (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. These two essential elements are sometimes referred to as "intentional and purposeful discrimination.' See Snowden v. Hughes, 321 U.S. 1, 8, 64 S.Ct. 397, 88 L.Ed. 497 (1943); Moss v. Hornig, 314 F.2d 89, 92-93 (2d Cir. 1963); United States v. Ahmad, 347 F.Supp. 912 (M.D.Po.1972), aff'd sub nom., United States v. Berrigan, 482 F.2d 171 (3rd Cir. 1973); United States v. Falk, 479 F.2d 616 (7th Cir. 1973) (en banc); United States v. Crowthers, 456 F.2d 1074 (4th Cir. 1972); United States v. Ahmad, 347 F.Supp. 912 (M.D.Pa.1972), Comment, 'The Right to Nondiscriminatory Enforcement of State Penal Laws,' 61 Colum.L.Rev. 1103 (1961). Mere 'conscious exercise of some selectivity in enforcement is not in itself a federal

> constitutional violation.' Oyler v. Boles, 368 U.S. 448, 456, 82 S.Ct. 501, 506, 7 L.Ed.2d 446 (1962).

Petitioners have failed to show that the prosecutor in the case at bar exercised his discretion invidiously or in bad faith. Respondents assert that the facts of the instant case present the justified use of discretion on the part of the prosecutor in deciding which cases to prosecute.

Petitioners cite *Fairchild v. Schanke,* 232 Ind. 480, 113 N.E.2d 159 (1953) in support of their argument that the prosecutor's selective enforcement of the Indiana gambling statutes is based on an unjustifiable standard. However, Respondent would point out that *Fairchild* was decided under principles of Indiana Constitutional law and the Indiana Supreme Court did not reach the broader federal question considered here. As a question of federal constitutional law, the failure of the prosecutor to prosecute charitable organizations does not constitute denial of equal protection to Petitioners.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

THEODORE L. SENDAK
Attorney General of Indiana

FRANK A. BALDWIN
Deputy Attorney General

Offices of the Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 232-6236
Attorneys for Respondent